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Recent Decisions: Constitutional Law--Freedom of Religion--Use of Drugs [*Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *cert. granted*, 36 U.S.L.W. 3473 (U.S. June 10, 1968) (No. 1365)]

Stephen M. O'Bryan

Recent Decisions

CONSTITUTIONAL LAW — FREEDOM OF RELIGION — USE OF DRUGS

Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *cert. granted*, 392 U.S. 903 (1968).

In 1966, Dr. Timothy Leary, the psychedelic psychologist and prophet,[1] was convicted of illegal concealment and transportation of marihuana by a United States district court.[2] Of the three timely constitutional questions presented by the case, the Court of Appeals for the Fifth Circuit faintly answered one, summarily dismissed the second, and altogether ignored the third in affirming the conviction.[3] This recent case, *Leary v. United States*,[4] is another example of a disturbing trend in American jurisprudence, for again

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[1] Leary holds a Ph.D. in clinical psychology and until recently was a member of the faculty at Harvard University. He has written and published seven books and 51 articles pertaining to the religious, scientific, and medical use of psychedelic drugs. Leary v. United States, 383 F.2d 851, 856-57 (5th Cir. 1967). His avowed purpose, as the founder of the League for Spiritual Discovery, is "to change and elevate the consciousness of the American within the next few years." NEW YORKER, Oct. 1, 1966, at 43.

[2] 383 F.2d at 854. Leary was found guilty of violating both 21 U.S.C. § 176(a) and 26 U.S.C. § 4744(a)(2). The former prohibits transportation, facilitation of transportation, and concealment of marihuana after importation. The latter prohibits transportation and concealment of marihuana without first making payment of the transfer tax.

Leary received the maximum penalty for each offense — a total of 30 years imprisonment and $40,000 in fines. The maximum sentence was imposed subject to the provisions of 18 U.S.C. §4208(b), which provides for a complete study of a defendant when a court desires detailed information for determining the sentence to be imposed. However, Leary's final conviction under 21 U.S.C. § 17(a) would require a mandatory sentence of five years, and under 26 U.S.C. § 7237 there can be no suspension of sentence or probation for such conviction.

[3] Leary's counsel effectively raised the constitutional questions in his points of error. The first point raised both of the first amendment issues, the "free exercise" question and the "establishment clause" question:

> In light of the federal exemption from restrictive legislation granted to religious users of peyote and the Government's inability to establish that marihuana is more harmful than peyote, the denial of a religious exemption from the marihauna legislation is an invidious religious discrimination in violation of the First and Fifth Amendments. 383 F.2d at 858.

The self-incrimination issue was also succinctly stated by Leary's counsel:

> The statutory requirement of a written order form (26 U.S.C. § 4742) and the imposition of a transfer tax (26 U.S.C. § 4741(a), violate appellant's constitutional privilege against compulsory self-incrimination and render invalid the conviction .... 383 F.2d at 858-59.

[4] 383 F.2d 851 (5th Cir. 1967), *cert. granted*, 392 U.S. 903 (1968).

a court failed to thoroughly examine and analyze traditional legal rules in the context of changed or changing societal norms.[5]

The first contention in Leary's defense was that the federal marihuana control statutes deprived him of the constitutional right to the free exercise of religion. At the trial, Leary had admitted his use of marihuana, but he had professed such usage to be exclusively as a sacramental aid in his religion.[6] In rejecting this argument the appellate court correctly observed that religious freedom under the first amendment "embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[7]

Traditionally, the freedom to overtly exercise one's religion has been deemed conditional and relative. A long line of United States Supreme Court decisions has evidenced that a legislature may constitutionally place certain limits on the free exercise of religious beliefs if such limits are deemed necessary to protect society, or if they are in the interest of public health or morals.[8] Thus, in the present case the court was well supported by precedent when it interpreted the federal statutes as indicating that Congress has manifested grave concern over the use of marihuana and has seen fit to proscribe it via severe criminal penalties because it poses a substantial threat to our country's safety, peace, and order. While the court found adequate support for its conclusions in the traditional constitutional

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[5] Indeed, a further thorough analysis should be forthcoming from the Supreme Court on the self-incrimination issue. Certiorari was granted by the Court on June 10, 1968, limited to the following questions:

> I. Whether the registration and tax provisions in 26 U.S.C. Sections 4741(a), 4742 and 4744(a), as applied to Petitioner, violate his privilege against self-incrimination protected by the Fifth Amendment . . . as amplified by this Court in three recently decided cases: Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968). . . .
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> IV. Whether petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176(a), providing that an inference may be drawn respecting the illegal origin and nature of marihuana solely from possession thereof.

Leary v. United States, *cert. granted*, 392 U.S. 903 (1968).

[6] It was established at trial that Leary was a convert to Hinduism and a member of the Brahmakrishma sect in Massachusetts. In India this sect uses marihuana for religious illumination and meditation. 383 F.2d at 857.

[7] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940), *cited in* 383 F.2d at 859.

[8] *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (Pennsylvania Sunday-closing statute upheld over Sabbatarians' free exercise arguments); Reynolds v. United States, 98 U.S. 145 (1878) (Mormons denied exemption from antibigamy laws); Application of President and Director of Georgetown Hospital, 331 F.2d 1000, *rehearing denied*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1965) (imposition of blood transfusion over religious objection).

rhetoric employed in the freedom of religion cases, its black and white approach side-steps analysis of deep-rooted constitutional and societal ambiguities existing in the law today.

Dr. Leary placed great emphasis on two recent free exercise cases which have specifically enunciated and refined the balancing test that is implied in the traditional constitutional jargon.[9] In *Sherbert v. Verner*,[10] the Court held that South Carolina's disqualification of a Seventh Day Adventist from unemployment compensation benefits solely because she would not accept Saturday employment imposed an unconstitutional burden on the free exercise of religion. The Court further demanded a showing of a compelling state interest to justify the substantial infringement of an individual's right to religious freedom.[11] And in *People v. Woody*,[12] a case similar to *Leary*, the Supreme Court of California reversed the convictions of a group of Navajo Indians arrested for illegal use of peyote, indicating that in the absence of a showing of a compelling state interest, the state may not prohibit the use of peyote for bonafide religious practices because the application of such a statute unconstitutionally infringes upon the first amendment right to the free exercise of religion. Mindful of the mandate in *Sherbert*, and of the traditionally preferred status of first amendment rights which tends to negate the presumption of constitutionality generally accorded legislation, the California court found that the individual's right outweighed the state's interest in abridging it. It concluded that the use of peyote presented only a slight danger to the state and to the enforcement of its laws and, on the other hand, found a greater and redeeming social value in preserving the religious heritage of the Native American Church.[13]

In spite of the rationale of these cases, and in the face of the recent Supreme Court trend toward a more critical judicial examina-

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[9] The competing interests in this balance are the individual's right, guaranteed by the Constitution, to freely exercise his religion, versus the state's interest in securing peace, safety, and the general welfare of its citizens.

[10] 374 U.S. 398 (1963).

[11] *Id.* at 406.

[12] 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). *See also* companion case *In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964), decided the same day as *Woody*. In *Grady* the court reversed the conviction of the petitioner who was the self-styled spiritual leader of a small group using peyote for religious purposes. *But see* State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied*, 386 U.S. 917 (1967), where the court unanimously affirmed the conviction of a young college-age man who claimed to be a Peyotist with Buddhist leanings and a recent convert to the Neo-American Church.

[13] 61 Cal. 2d at 727, 394 P.2d at 77, 40 Cal. Rptr. at 821.

tion of the use of the police power when first amendment religious freedoms are at stake,[14] the *Leary* court did not find itself compelled to critically examine the conflicting interests which posed the constitutional issue. Instead, the court emphasized the weight accorded congressional legislation, and thereby "ducked" consideration of a true "balancing of interests" approach.

The court discounted Leary's argument based on *Sherbert* that the burden was on the government to show a compelling interest to justify abridgement of first amendment rights by concluding that *Sherbert* is inapplicable because it concerned a social welfare statute and not one that imposed criminal sanctions.[15] Although the divergent ends of these statutes represent a valid distinction, the implication that a criminal statute requires less constitutional consideration than its humanitarian counterpart cannot be sustained, especially when both are shown to equally curtail the free exercise of religion.[16] Nevertheless, the court's constitutional inquiry amounted merely to a short review of the legislative history of the Marihuana Tax Act of 1937.[17] From this review it was concluded that Congress wisely passed the act and thus it clearly met the "compelling State interest" test imposed by *Sherbert*.[18] With this circumlocution, the court implied that the government, in 1968, does not have to show a present compelling federal interest to justify abridgement of first amendment rights because in 1937 the Act was wisely adopted, and thus, it meets the present constitutional standard.[19]

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[14] This trend has resulted in the use of an exemption technique which grants immunity from statutes for bona fide religious practices. *See* Sherbert v. Verner, 374 U.S. 398 (1963); *In re* Jenison, 125 N.W.2d 588 (Minn.), *on remand from*, 375 U.S. 14 (1963) (mem.). *See generally* 17 STAN. L. REV. 494-95 (1965).

[15] 383 F.2d at 860.

[16] *But see* Note, *Hallucinogens*, 68 COLUM. L. REV. 521, 550 (1968), where it is submitted that the distinction between *Woody* and *Leary* is the doctrine that religious practice can be no defense to prosecution under a valid criminal statute prohibiting conduct rather than belief. Thus, it is concluded that wherever the state makes a colorable claim that its regulation protects the health or safety of its citizens, a defense to that regulation based on the free exercise clause will fail. *Id.* at 551. This may be a realistic appraisal of what in fact usually occurs, *e.g.*, the *Leary* case; but the point is, *should* sacred individual rights traditionally safeguarded by the first amendment give way to colorable state claims?

[17] 50 Stat. 551 (1937), *as amended*, INT. REV. CODE OF 1954 §§ 4741-76, 26 U.S.C. §§ 4741-76 (1954). The court presented this view in 383 F.2d at 869.

[18] 383 F.2d at 869. It is interesting to note that many have charged that the 1937 Act was scare-enacted and was the result of a long and zealous publicity campaign spearheaded by the Federal Bureau of Narcotics and especially by its chief, Harry J. Auslinger. *See* A. LINDESMITH, THE ADDICT AND THE LAW 228 (1965); *Foreword: Marihuana Myths*, in THE MARIJUANA PAPERS at XV (D. Solomon ed. 1966).

[19] Such an approach overlooks the fact that the use of marihuana for religious experience was not prevalent in the United States at that time, and probably was not

Such an approach to judicial review limits the extension of personal rights in a culturally changing society.

Although the *Leary* court's fixation on congressional intention foreclosed any meaningful consideration of the conflicting interests that should be weighed in free exercise cases, the court did tacitly beg such a consideration when it concluded:

> It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes, the anti-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, 'turn on,' is the 'in' thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana.[20]

There is evidence to support the above assertion,[21] which suggests a compelling state interest in the control of marihuana, and it is unfortunate that the court did not specifically analyze the dangers and enumerate the enforcement problems that compose such interest. Clearly, it is within the police power for the legislature to regulate activities which pose a substantial threat to the public safety, peace, or order.[22] Yet, fortunately, in recent years several progressive courts have refused to accept such vague generalities as "unimaginable harm" and "difficulty of enforcement" as *ipso facto* rationales for the imposition of police power regulations that abridge the free exercise of religion.[23]

When constitutional immunity is sought for religious use of marihuana, there are realistic considerations which should serve as inputs in applying the balancing process, and upon which a court can make an analytical determination. First, the court must consider the sincerity and conviction of the individual in his belief.[24] If

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even considered when the act was passed. It also overlooks the fact that by 1955 even Mr. Auslinger had toned down his previous views enunciated in 1937, especially in regard to marihuana's propensity to lead to violent crime. *See* A. LINDESMITH, *supra* note 18, at 230-31.

[20] 383 F.2d at 861.

[21] *See* notes 26 and 31 *infra* & accompanying text.

[22] *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[23] *See* People v. Woody, 61 Cal.2d 716, 724, 394 P.2d 813, 819, 40 Cal. Rptr. 69, 75 (1964). *See also* cases cited note 14 *supra.*

[24] However, as it has been repeatedly held, the first amendment prohibits judicial

convinced of the individual's good faith the court must, in light of legislative inaction, consider the realistic and actual threat the substance poses for the individual and for society as a whole. Certainly, recent discontent with the established church in today's society, the markedly increased examination of "turning on" and "dropping out," and the ever increasing use of "psychedelic" drugs for abusive as well as legitimate religious and scientific purposes,[25] indicate that the law can no longer afford to delay making these determinations.

Actually the only risk to the individual from the use of marihuana, that has been scientifically verified, is the fact that continued use can produce a psychological dependency.[26] Thus one possible *substantial* danger which the religious use of marihuana might pose to society is its use as an escape from reality. However, such a threat is equally as great with a number of other legal substances, such as alcohol and barbituates.[27] It would appear that 30 years after the passage of the Marihuana Tax Act the effects of the drug are no longer "unimaginable," since the physical and physiological

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inquiry into the believability of an individual's creed. *See, e.g.*, United States v. Ballard, 322 U.S. 78 (1943), where the Court said:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. *Id.* at 86-87.

See generally Note, *Constitutional Law: (Fredom of Religion) + (LSD) = (Psychedelic Dilemma)*, 41 TEMP. L.Q. 52, 54-55 (1967) (helpful discussion of the importance of "good faith").

[25] *See* Blum, *Mind Altering Drugs and Dangerous Behavior, Dangerous Drugs*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 24 (1967), indicating a vast increase in the use of marihuana among middle-class students.

[26] This is especially so if the user has preexisting psychotic tendencies. *See* McGlothlin, *Cannabis: A Reference*, in THE MARIJUANA PAPERS 410-12 (D. Solomon ed. 1966). All of the other supposed evils that the use of marihuana poses for society have not been empirically demonstrated. The charges that marihuana smoking leads to violent and aggressive acts and thus causes major crimes has never been substantiated. *See id.* at 412. The myth that the use of marihuana will eventually lead to heroin or opium addiction has never been proved. See A. LINDESMITH, *supra* note 18, at 230-31, where it is reported that even Mr. Auslinger, former head of the Bureau of Narcotics, went on record in 1937 stating that the marihuana user does not usually graduate to heroin, opium or cocaine. The fear that marihuana use causes insanity has been widely dispelled as unfounded. *See* Allentuck & Bowman, *Psychiatric Aspects of Marihuana Intoxication*, in THE MARIJUANA PAPERS 361 (D. Solomon ed. 1966). And the accusation that marihuana is widely used for erotic pleasure and sexual exploitation has never been demonstrated. *See The LaGuardia Study*, in *id.* at 250. Moreover, there is general medical and scientific agreement that marihuana is not a narcotic, does not produce a tolerance or cause any of the withdrawal symptoms of the opiates, and as such is nonaddictive. *See* Note, *supra* note 24, at 62 & n.50.

[27] *See* A. LINDESMITH, *supra* note 18, at 234, concluding that: "All empirical investigations indicate that alcohol constitutes a far greater social danger than does marihuana."

effects are at least as empirically measurable as the effects of alcohol.[28]

Thus, the significant question — the extent to which it has been answered by implication in cases such as *Leary* can only be conjectured — would appear to be, should the courts grant constitutional immunity for the free exercise of psychedelic religion?

Decisions of the Supreme Court seem to indicate that one who professes a psychedelic religion can only be questioned as to his sincerity and good faith, not to the believability of his creed.[29] Furthermore, recent cases imply that the concept of religious belief is broad enough to accommodate psychedelic cults under the first amendment protection.[30] From this it can be concluded that precedent does not stand as an inflexible bar to an affirmative response to the above mentioned query. However, it is conceivable that the effects of marihuana and other psychedelic substances, that have given rise to their use as a religious aid, are the same effects that stand in the way of constitutional protection. The propensities of these drugs to alter the ego structure and cause a change in perception, usually reaching a zenith at the "intoxication level" when sensory hallucinations occur, have given rise to their use for religious experience.[31] Although many have asserted that religious experience outside of reality cannot be meaningful within the normal environment, and others have criticized psychedelic experience as a theological shortcut,[32] no one has ventured to cast the first stone and deny its spiritual value *per se.*

When these considerations are viewed in light of this country's fundamental commitment to protect the free exercise of religion, the *Leary* court's approach in not realistically evaluating or even considering the possibility of a constitutional exemption for sacramental use of marihuana seems shortsighted.[33] In a new era, with

[28] McGlothlin, *supra* note 26, at 412-15. McGlothlin suggests that one of the reasons why cannabis is so regularly banned in countries where alcohol is permitted is the positive value placed on action, and the hostility toward passivity found in Anglo-Saxon cultures.

[29] *Cf.* note 24 & accompanying text.

[30] United States v. Seeger, 380 U.S. 163 (1965). The Court held that a belief which occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God could qualify for conscientious objector exemption from the Universal Military Training and Service Act, 50 U.S.C. §§ 451-71 (App. 1964).

[31] *See* Note, *supra* note 16, at 533-34; Note, *supra* note 24, at 74. But it is in this "high" condition that the state has a valid concern. As in the case of the drunk, this condition can produce automobile accidents or other irresponsible acts. *Cf.* Bieser, *Drugs and the Law or Who Pays for the "Trip,"* 36 U. CIN. L. REV. 39 (1967).

[32] Note, *supra* note 24, at 73 & nn. 95-98.

[33] The law has demonstrated that it is capable of proscribing certain conduct

new religions and cults challenging the basis of the Judeo-Christian heritage, the first amendment must be interpreted with tolerance if it is to have meaning at all. The words of Mr. Justice Jackson in *West Virginia State Board of Education v. Barnette*[34] are particularly relevant today:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. . . . But, freedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order.[35]

In light of the *Leary* court's conservative and skeptical approach to the constitutional dilemma posed by the sacramental use of marihuana, the viability of Mr. Justice Jackson's ideal may be in jeopardy.

The second interesting constitutional question in the *Leary* case, raised by defendant's invocation of the fifth amendment privilege against compulsory self-incrimination, has been given much support by three recent Supreme Court decisions.[36] The appellate court summarily dismissed Leary's contention that those sections of the *United States Code* which impose a tax on all transfers of marihuana and which require that transfers be accompanied by written order forms issued by the Secretary of the Treasury are unconstitutional when tested against that mandate of the Bill of Rights.[37] However, subsequent to the rejection of Leary's argument, the Supreme Court has held that an individual who properly raises the fifth amendment privilege cannot be criminally punished for failure to comply with the federal wagering tax stamp statutes.[38] While the Court spe-

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while allowing exceptions for legitimate and regulated aspects of the proscribed activity. Gambling is one such excellent example. During prohibition, when the harmful effects of alcohol were "hardly imaginable" and when that substance was considered injurious to the public health and morals, religious exemptions for sacramental usage were liberally granted. National Prohibition Act, ch. 85, 41 Stat. 305, 308 (1919).

[34] 319 U.S. 624 (1943).

[35] *Id.* at 641-42.

[36] *See* cases cited in note 5 *supra.*

[37] 383 F.2d at 870. *See* note 5 *supra.*

[38] Marchetti v. United States, 390 U.S. 39, 61 (1968). The reasons the Court enumerates for this holding all appear equally applicable to the marihuana registration tax problem. The Court first pointed out that wagering is "an area permeated with criminal statutes," and those engaged in wagering are a group "inherently suspect of criminal activities." *Id.* at 47. Also, it realistically acknowledged that information obtained as a consequence of the federal wagering tax laws is readily available to assist state and federal authorities in prosecutions for gambling. Thus, the Court concluded that the obligations to register and pay the gambling tax created "real and appreciable" and not merely "imaginary and unsubstantial" hazards of self-incrimination. *Id.* at 48.

cifically narrowed the holding to the wagering tax stamp situation, its emphasis on "an area permeated with criminal statutes"[39] and "substantial hazards of incrimination,"[40] should open the door into the highly analogous area of marihuana registration and transfer taxes for a similar invocation of the fifth amendment privilege.[41]

The third constitutional issue, which was completely ignored by the *Leary* court, regards the first amendment prohibition of any law respecting the establishment of religion. Leary argued that federal exemption from restrictive legislation granted to religious users of peyote[42] would constitute invidious religious discrimination if like exemptions were not granted to him.[43] Although this "tit for tat" argument is not entirely sound, it does raise blatant "establishment clause" problems not dealt with in the opinion. This clause, as interpreted recently by the Supreme Court, imposes on all organs of government an obligation of strict neutrality toward religious issues,[44] and requires that legislation, in order to be constitutional, must have a secular purpose and a primary effect that neither advances nor inhibits religion.[45] Federal exemption of *some* drugs for sacramental purposes would seem *prima facie* to conflict with the strict constitutional standard. Again, it would appear that the *Leary* court, by failing to realistically evaluate the issues, comfortably evades the pressing constitutional and societal "hang-ups" presented to it.

In holding as they did, the Court also clearly distinguished the "public records" doctrine of Shapiro v. United States, 335 U.S. 1 (1947), and found it inapplicable because: (1) Marchetti was not required by administrative order to keep and preserve records; (2) information desired by the government was not public information in the traditional usage of the term; and (3) *Shapiro* requirements were imposed in "an essentially non-criminal and regulatory area of inquiry" not directed to a "selective group inherently suspect of criminal activity." *Id.* at 57. Also definitely applicable to both gambling and marihuana registration taxes is the Communist Party registration case, Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965), which has been read as providing fifth amendment immunity for prosecutions based on interrelated statutory schemes, an *obvious purpose* of which is to coerce evidence from persons engaged in illegal activities for use in their prosecution. *See* concurring opinion of Mr. Justice Brennan, *id.* at 73.

[39] *Id.* at 47.

[40] *Id.* at 61.

[41] *See* Note, *supra* note 16, at 548, for the same prediction.

[42] The Federal Commissioner of Food and Drugs has exempted peyote from use in bona fide religious ceremonies of the Native American Church, 21 C.F.R. § 166.3(c). 383 F.2d at 861. Also the States of New Mexico, Montana, Arizona, and California have like exemptions. People v. Woody, 61 Cal. 2d at 723-24, 394 P.2d at 819, 40 Cal. Rptr. at 75.

[43] 383 F.2d at 858.

[44] Abington School Dist. v. Schempp, 374 U.S. 203, 225-26 (1963).

[45] *Id.* at 222.